

No. 89-2015

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1989

SISSETON-WAHPETON SIOUX TRIBE, of the  
Lake Traverse Indian Reservation, North Dakota and  
South Dakota; DEVILS LAKE SIOUX TRIBE, of the  
Devils Lake Sioux Indian Reservation, North Dakota;  
SISSETON-WAHPETON SIOUX COUNCIL, of the  
Assiniboine and Sioux Tribes of the  
Fort Peck Indian Reservation, Montana,

*Petitioners,*

v.

UNITED STATES OF AMERICA; DONALD P. HODEL,  
Secretary of the Interior; JAMES A. BAKER,  
Secretary of the Treasury,

*Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## SUPPLEMENT TO STATEMENT OF THE CASE <sup>1</sup>

1. In the underlying action, Sisseton and Wahpeton Bands or Tribes v. United States, 10 I.C.C. 137 (1962), the Indian Claims Commission (hereinafter "Commission") determined that petitioners "are entitled to bring and maintain the claims...for and on behalf of its members and all other descendants of the original bands of Sisseton and Wahpeton Sioux." Id. at 180. When the claims were settled by stipulation, the Department of Justice, the Department of the Interior and the Commission required approval of the settlement only by petitioners and their members. The settlement, as approved by the parties and in the Commission's judgment, recognized petitioners' sole entitlement to the judgment awarded. Petitioners' action

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<sup>1</sup> A supplement is necessitated by the Government's inaccurate representation of certain facts.

seeks to guarantee that the judgment fund is distributed, as ordered by the Commission, only to petitioners and their members.<sup>2</sup>

2. Petitioners did not participate in developing the distribution to lineal descendants adopted in the Act of October 25, 1972, 86 Stat. 1168, 25 U.S.C. 1300d et seq. (Pet.App. at 50-53), and endorsed the distribution only when their hands were forced. In 1970, when Congress first considered a measure for the distribution of the judgment fund involved here, the bill proposed that 100% of the fund be distributed to Sisseton-Wahpeton Sioux

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<sup>2</sup> The dispute does not "pit[] one group of Indians against another." Resp.Br. at 6. The dispute is between petitioners and the United States. The action seeks to compel the United States to honor a judgment rendered against it and to prevent the United States from distributing a portion of the judgment fund to persons with no legitimate claim to or interest in such fund.

lineal descendants. Despite the fact that petitioners, then as now, were federally recognized tribes, the proposal was based on Department of the Interior representations that there were no successor tribal entities to the aboriginal Sisseton and Wahpeton Sioux Tribes. H.Rep.No. 1150, 91st Cong. 2d Sess. 3 (1970); 116 Cong.Rec. 19722 (June 15, 1970). In 1972, the Department corrected this mistake. H.Rep.No. 1369, 92d Cong. 2d Sess. 3-4, 8 (1972); S.Rep.No. 144, 92d Cong. 1st Sess. 2, 4 (1971); 118 Cong.Rec. 30640 (October 13, 1972). The Department, though, continued to support a distribution of part of the judgment fund to lineal descendants because, it was claimed, individuals not members of the petitioner tribes existed who could trace lineal descent from members of the aboriginal Sisseton and Wahpeton Sioux Tribes.

S.Rep.No. 144, supra, at 5. The Department acknowledged, however, that the lineal ancestors of these individuals had severed all relations with the aboriginal Tribes. Id. at 4-5.

Petitioners opposed a lineal descendency distribution. S.Rep.No. 1339, 91st Cong. 2d Sess. 8 (1970) ("Those who are members of the modern entities listed in the bill feel that [tribal] membership plus lineal descendency should be the criteria for sharing in the award"); "Distribution of Funds Awarded the Sisseton-Wahpeton Tribes of Sioux Indians by the Indian Claims Commission in 1967," Hearing before the Select Committee on Indian Affairs, United States Senate, 99th Cong. 2d Sess. 61-62 (1986) (hereinafter "1986 Senate Hearing") ("It was a collective position of the tribes that lineal descendants did not belong in the legislation for distribution

of money"). Petitioners ultimately were forced to acquiesce in the distribution to lineal descendants, out of a desperate need for money, only when it became evident that absent such acquiescence no bill would pass. Id.

3. The Department of the Interior now opposes the distribution to lineal descendants at issue here. The Department maintains that where a tribal entity exists that is the successor to the aboriginal tribe whose lands were taken, national policy recognizes the sole right of such tribe to a Commission award. The Department also holds that lineal descendency distributions contravene the federal objective of tribal self-determination. 1986 Senate Hearing, supra, at 9, 28; S.Rep.No. 468, 99th Cong. 2d Sess. 5 (1986).

## ARGUMENT

1. Respondent argues that "any separation of powers or due process claims that petitioners have had accrued in 1972." Resp.Br. at 7. The argument begs the question of whether application of the statute of limitations, 28 U.S.C. 2401(a), itself violates the separation of powers doctrine or petitioners' due process rights. Pet. at 7-11. With respect to the separation of powers question, in particular, this Court has framed the question as whether "Congress impermissibly has disturbed the finality of a judicial decree by rendering the...earlier judgments in this case mere advisory opinions." United States v. Sioux Nation of Indians, 448 U.S. 371, 391 (1980). Sioux Nation affirms that the Congress breaches the constitutional separation of powers whenever it reviews the merits of a

judicial decision and acts to reverse or otherwise alter a judicial judgment. Id. at 407. Here Congress, in the 1972 Distribution Act, has not only reviewed the merits of the Commission's finding that petitioners represented all of the descendants of the aboriginal Sisseton and Whapeton Sioux Tribes,<sup>3</sup> and partially

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<sup>3</sup> Respondent reasons that the 1972 Act did not alter the Commission's judgment because Congress determined that "petitioners do not represent all the descendants of the aboriginal bands affected." Resp.Br. at 7-8. However, this congressional finding directly conflicts with the Commission's judicial determination of the matter. The Commission's judgment awarding 100% of the amount awarded to petitioners was based on this determination. Moreover, this Court has determined in Delaware Tribal Business Committee, v. Weeks, 430 U.S. 73, 85 (1977), that tribes, not individuals, are entitled to Commission awards, and that the lineal descendants of persons who had severed all relations with the aboriginal tribe are not constitutionally entitled to share in such awards, 430 U.S. at 86-87, 89 n. 2. Accordingly, the statute at issue in Weeks was upheld even though the distribution included nonmembers of the tribe because, unlike here, the nonmembers had either a close affiliation with the tribe or ancestors who had not severed

reversed the Commission's judgment awarding 100% of the judgment to petitioners. See also, Sioux Nation, 448 U.S. at 427 (Rehnquist, J., dissenting)("Congress is vested by Art. I with legislative powers, and may not itself exercise an appellate-type review of judicial judgments in order to alter their terms"). According to the courts below, Congress has also imposed a statute of limitations applicable to actions to enforce judgments and to secure the rights granted therein. Applying section 2401(a) to such an action, at least has "interfered with...[the Commission's] judicial function in deciding the merits of the [petitioners'] claims," Sioux Nation,

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their tribal relations. See Resp. Br. at 11. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 951 (Ct.Cl. 1974), is not, as respondent contends (Resp. Br. at 8), contrary because the "lineal descendants" here are not "members or components of the prevailing group."

448 U.S. at 406, if not imposed "'control [over] the exercise of...judicial power,'" Pope v. United States, 323 U.S. 1, 8-9 (1944), quoted in Sioux Nation, 448 U.S. at 428 (Rehnquist, J., dissenting). By applying section 2401(a) to bar the judgment enforcement action here, the finality of the Commission's decree is disturbed, not protected.

2. In answering petitioners' argument that application of section 2401(a) to bar petitioners' claims is contrary to the Indian Claims Commission Act, respondent states that petitioners' claims arose after 1946 and, therefore, are not subject to the statute of limitations waiver contained in that Act. Resp.Br. at 8-10. Respondent further attacks petitioners' argument on the ground that permitting their action to proceed would undermine the purpose of the Act to "resolv[e] tribal claims with

finality." Id. at 10.

While the final resolution of claims was indeed a goal of the Act, the Congress stressed that the Act was achieve finality with justice. Application of section 2401(a) to bar petitioners' claims does not resolve petitioners' claims or achieve finality; it simply precludes petitioners' from prosecution of their claims and perpetuates the very injustice that the Act was passed to remedy. While acknowledging that in 1968 petitioners were paid the amounts awarded in the 1967 Commission judgment (Resp.Br. at 9 n. 7), respondent is apparently content to take 25% of petitioners' judgment fund and disburse it in violation of petitioners' vested property rights. This is not what the Act intended.

More importantly, unless form is elevated over substance, petitioners'

claims did not accrue after 1946. The claim that petitioners alone are entitled to the 25% set aside for lineal descendants in 1972 is part of and a continuation of the claim and case before the Commission. Petitioners' judgment enforcement action is simply a subsequent proceeding within the Commission case just as such an enforcement action would be in any other judicial proceeding.

3. Opposing petitioners' alternative contention that their claims did not accrue until 1987, respondent states that petitioners' claims "turn on Congress's decision to distribute 25% of the judgment fund to a class of non-members rather than on the particular identity of the non-members." Resp.Br. at 10. This is simply wrong because the class of non-members is identified in the 1972 Distribution Act as "All other Sisseton and Wahpeton Sioux" and

petitioners' claim is that the distribution that the Secretary of the Interior intends to make is to non-Sisseton and Wahpeton Sioux. This claim could only first be asserted in 1987 when the identities of the distributees became known. Prior to that time, it remained possible that the distributees would be persons eligible under the 1972 Act. For the same reason and contrary to respondent's position (Resp.Br. at 11 n. 8), the repudiation of the trust fund by the Government did not occur until 1987.

### CONCLUSION

For all of the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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